STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 16, 2011
v	No. 297914 Saginaw Circuit Court
MARK EARL WHITE, Defendant-Appellant.	LC No. 09-032970-FC

Before: MURRAY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of bank robbery, MCL 750.531, false report of a bomb threat, MCL 750.411a(3)(a), carjacking, MCL 750.529a, and resisting or obstructing a police officer, MCL 750.81d(1). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 14 to 70 years for the bank robbery conviction, 7 to 15 years for the false report of bomb threat and resisting or obstructing a police officer convictions, and 420 to 840 months for the carjacking conviction. We affirm.

I. FACTS

On July 8, 2009, a man approached Ashley Earle's teller window at Citizens Bank in Saginaw. The man handed Earle a note and placed a small bag on the counter. The note read, "Do not call. The bomb will go off. Lock the door for 30 minutes. You are being watched. Do not call." The handwriting on the note was difficult to read and Earle was only able to read a few of the sentences. Earle looked at the man, and he told her, "Hundreds, fifties, and twenties, no straps, no dye packs." Earle gave the man the money in her teller drawer. The money totaled $1,055. After the man walked out of the bank, Earle pressed the security alarm button. At trial, Earle identified the man as defendant.

Officer Scott Jackson, who was working in plain clothes and in an unmarked vehicle on July 8, 2009, responded to the dispatch call of a bank robbery with the intent to search for the suspect. He observed a man fitting the suspect's description, and he saw a marked patrol vehicle drive past the man. According to Jackson, the man took "specific notice" of the marked patrol vehicle because the man changed the direction he was walking. Jackson pulled over to the area where the man was walking. He intended to pull in front of the man and let the marked patrol vehicle, which was turning around, stop behind the man. As Jackson slowed his vehicle, the man walked toward it, waving him down for a ride. When Jackson stopped his vehicle, the man

opened the passenger side door and "immediately fell on top of" Jackson. The man put his left shoulder into Jackson's right shoulder and placed both of his hands on the steering wheel. He took partial control of the vehicle. Jackson punched and yelled at the man to get out of the vehicle. He forced the man out of the passenger door, and followed him out, laying on top of the man on the ground.

Outside on the ground, Jackson repeatedly told the man, "[P]olice, give me your hands, give me your hands." Jackson secured the man's left hand, but the man's right hand was under his body and the man refused to give it up. Officer Ian Wenger, the driver of the marked patrol vehicle, approached the two men. He advised the man that he was a police officer and ordered the man to give up his hands. When the man continued to struggle, Wenger tased him. Even after the tase cycle stopped, the man continued to resist Jackson and Wenger before the two officers were able to control him. The man, later identified as defendant, was handcuffed, and $1,055 was found in his pocket during a pat down.

According to Wenger, he activated his vehicle's lights and siren when he observed defendant approach Jackson's vehicle. Jackson could not recall if the lights on the marked patrol vehicle were activated, but he recalled hearing a siren while he was on the ground struggling with defendant.

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that his convictions for carjacking, false report of a bomb threat, and resisting or obstructing a police officer must be vacated because the convictions are not supported by sufficient evidence. We disagree.

We review de novo challenges to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *Id.*

Initially, defendant claims that his conviction for carjacking is not supported by sufficient evidence because there was no evidence that he utilized force or violence, made a threat of force or violence, or put Jackson in fear. He also claims there was no evidence that he took or attempted to take Jackson's vehicle. A person is guilty of carjacking if (1) during the course of committing a larceny of a motor vehicle (2) the person used or threatened force or violence, or put in fear (3) an operator, passenger, or person in lawful possession of the vehicle or lawfully attempting to recover the vehicle. MCL 750.529a(1). The offense of carjacking includes attempts to commit the offense. *People v Williams*, 288 Mich App 67, 80; 792 NW2d 384 (2010).

At trial, Jackson testified that after defendant opened the passenger door of his vehicle he "felt force" from defendant. He explained that defendant was "immediately" on top of him; defendant put his left shoulder into Jackson's right shoulder. Jackson testified that defendant also put his hands on the steering wheel and gained partial control of the vehicle. According to Jackson, defendant was attempting to take control of the vehicle so that he could get away from the marked patrol vehicle. Jackson had to use force to get defendant out of his vehicle. Viewing

Jackson's testimony in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant used force against Jackson and that he did so while attempting to take control of the vehicle. Defendant's conviction for carjacking is supported by sufficient evidence.

Next, defendant claims that his conviction for false report of a bomb threat is not supported by sufficient evidence because his false bomb threat was never communicated when Earle did not read the part of his note concerning the bomb. A person shall not make a false report of an explosive substance in a building "and communicate or cause the communication of the false report to any other person, knowing the report to be false." MCL 750.411a(2)(a).

The evidence shows that the note that defendant gave to Earle clearly contained a bomb threat. It stated, "Do not call. The bomb will go off . . . ." However, apparently because of defendant's poor handwriting, Earle was unable to read the actual bomb threat in the time that defendant gave her to read the note. To "communicate" means "to impart knowledge of; make known; divulge." *Random House Webster's College Dictionary* (1992). Here, by handing the note with a bomb threat to Earle, defendant intended, and did what was necessary by him, to make known or divulge the presence of a bomb in the bank. We find no merit to defendant's argument that because Earle was unable to read the part in the note that concerned the bomb, defendant did not communicate a false bomb threat. Defendant's conviction for false report of a bomb threat is supported by sufficient evidence.

Finally, defendant asserts that his conviction for resisting or obstructing a police officer is not supported by sufficient evidence because there was no evidence that he knew or should have known that he was resisting police officers. The elements of resisting or obstructing a police officer are (1) an individual assaulted, battered, wounded, resisted, obstructed, opposed, or endangered another person and (2) the individual knew or had reason to know that the other person was a police officer performing his or her duties. MCL 750.81d(1); *People v Corr*, 287 Mich App 499, 503; 788 NW2d 860 (2010).

Jackson's testimony regarding this charge was that after he forced defendant out of his vehicle, he repeatedly told defendant, "[P]olice, give me your hands, give me your hands." During Jackson's struggle with defendant, Wenger, who was wearing a police uniform, arrived. He had activated his vehicle's lights and siren, and Jackson recalled hearing the siren during his struggle with defendant. Wenger advised defendant that he was a police officer and ordered defendant to "give up his hands." Viewing this evidence in the light most favorable to defendant, a rational trier of fact could have found beyond a reasonable doubt that defendant knew or had reason to know that Jackson and Wenger were police officers when he resisted or opposed their commands. Defendant's conviction for resisting or obstructing a police officer is supported by sufficient evidence.

III. SENTENCING

Defendant argues that he is entitled to be resentenced because the trial court erred in scoring offense variables (OVs) 10 and 16 for the bank robbery conviction and OVs 9, 10, and 16 for the false report of a bomb threat and carjacking convictions. We disagree.

The record shows that defendant challenges the scoring of OVs on three sentencing information reports (SIRs). SIRs were prepared for defendant's convictions for bank robbery, false report of a bomb threat, and carjacking.[1] In order to resolve defendant's challenges to the scoring of the OVs, we must first determine if all three SIRs, or only one or two, control our review of defendant's sentences. Generally, whether an SIR must be prepared for a conviction when a defendant has been convicted of multiple offenses depends on whether the sentence for the conviction will run concurrent or consecutive to the other sentences. MCL 771.14(2)(e). An SIR must be prepared for each conviction for which a consecutive sentence is authorized. MCL 771.14(2)(e)(*i*). But for convictions with sentences that will run concurrent, an SIR need only be prepared for the conviction of the highest crime class. MCL 771.14(2)(e)(*ii*); *People v Mack*, 265 Mich App 122, 126-128, 130; 695 NW2d 342 (2005).

Of defendant's four convictions, a consecutive sentence is only authorized for the carjacking conviction. MCL 750.529a(3). Therefore, an SIR was required for sentencing on the carjacking conviction. Because defendant's sentences for his convictions of bank robbery, false report of a bomb threat, and resisting or obstructing a police officer must run concurrent, an SIR was only required to be prepared for the conviction of the highest crime class, which is bank robbery, a class C crime, MCL 777.16y.[2]

In this context, we find no merit to defendant's challenge to the scoring of OVs 9, 10, and 16 for his conviction of false report of a bomb threat. No SIR was required for the conviction. Consequently, errors, if any, in the scoring of the OVs for the false report of a bomb threat conviction are harmless.

For similar reasons, we find no merit to defendant's challenge to the scoring of OVs 10 and 16 for the bank robbery conviction. Although the trial court had statutory authority to impose a consecutive sentence for the carjacking conviction, it, in its discretion, opted to impose a sentence for the carjacking conviction that runs concurrent to defendant's three other sentences. Under these circumstances, because carjacking, which is a class A offense, MCL 777.16y is of a higher crime class than bank robbery, defendant could be sentenced on the bank robbery conviction using the SIR prepared for the carjacking conviction. See *Mack*, 265 Mich App at 127-128. Consequently, the validity of defendant's sentence for the bank robbery conviction is measured by the scoring of the OVs for the carjacking conviction, and errors, if any, to the scoring of OVs 10 and 16 for the bank robbery conviction are harmless. Thus, the only issue properly before us is whether the OVs for the carjacking conviction were properly scored.

We note that contrary to defendant's assertions, the trial court did not score any points for OVs 10 or 16 for the carjacking conviction. The OV point total for the carjacking conviction

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[1] An SIR was not prepared for the resisting or obstructing a police officer conviction.

[2] A false report of a bomb threat is a class F crime, MCL 777.16t, and resisting or obstructing a police officer is a class G crime, MCL 777.16d. When a defendant is sentenced to concurrent sentences, the sentencing guidelines do not apply to the convictions of the lesser class crimes. *Mack*, 265 Mich App at 128, 130.

was 25 points; 10 points were scored for OV 9 and 15 points were scored for OV 19.[3] Defendant did not object to the scoring of OV 9 for the carjacking conviction. We review an unpreserved challenge to the scoring of an offense variable for plain error. *People v Odom*, 276 Mich App 407, 411; 740 NW2d 557 (2007).

OV 9, which concerns the number of victims, MCL 777.39, must be scored only in reference to the sentencing offense. *People v McGraw*, 484 Mich 120, 133-134; 771 NW2d 655 (2009) (holding that the trial court erred in scoring 10 points for OV 9 based on defendant's conduct in fleeing and eluding the police when the sentencing offense was breaking and entering a building with intent to commit larceny).[4] Ten points may be scored for OV 9 if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death." MCL 777.39(1)(c).

Defendant does not dispute that Officer Jackson was a victim of the carjacking, but claims that under the rule of *McGraw*, Jackson was the only victim of the carjacking offense. We agree that, pursuant to *McGraw*, Earle and the other tellers and customers present in the bank during the bank robbery cannot be considered victims. However, we disagree that Officer Wenger cannot be considered a victim. The evidence at trial established that after defendant attempted to gain control of Jackson's unmarked police vehicle, Jackson used physical force to get defendant out of the vehicle. Jackson followed defendant out the passenger side door and attempted to restrain him. Wenger approached and aided Jackson. Defendant refused to obey the commands of Jackson and Wenger, forcing Wenger to tase him. Under these circumstances, where Wenger was placed in danger of physical injury in aiding Jackson to restrain defendant immediately after Jackson pushed defendant out of his vehicle, the trial court did not plainly err in scoring 10 points for OV 9.

IV. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises numerous issues in his standard 4 brief. We find no merit to any of the arguments.

Defendant first claims that he was denied the right to represent himself at the preliminary examination. A defendant must request permission to represent himself, *Odom*, 276 Mich App at 419, and such a request must be unequivocal, *People v Williams*, 470 Mich 634, 643; 683 NW2d 597 (2004). Defendant never requested that he be allowed to represent himself at the preliminary examination. At the preliminary examination conference, defendant stated that he planned to ask for "co-counsel status" but also declared that he had no intention "to stand up in front of this court . . . and try to play lawyer." Defendant made no mention of his right to self-representation at the preliminary examination, where he was represented by counsel, until the

[3] Defendant does not challenge the scoring of OV 19.

[4] In *McGraw*, the defendant was not chased from the building by the police. *McGraw*, 484 Mich at 122. The chase began after an eyewitness reported the larceny and a police officer saw the defendant's getaway car traveling on a road.

conclusion of the hearing when he complained of being denied access to a law library. The record establishes that defendant did not make an unequivocal request to represent himself until after he was bound over for trial. Accordingly, we find no merit to defendant's claim that he was denied the right to represent himself at the preliminary examination.

Defendant next raises numerous issues about a witness list that was filed with the trial court in November 2009 and an amended witness list that he provided to standby counsel in March 2010. He argues that standby counsel, by refusing to subpoena the witnesses listed on the March 2010 list, made a tactical decision that violated his right to self representation. He argues that he was denied his right of access to the courts when the county jail refused to provide postage when a witness list must be served on the prosecutor. Defendant further claims that his "medical and mental" defense should have been allowed and that the "complete denial" of witnesses in support of the defense violated his constitutional rights.

In November 2009, defendant provided two copies of a witness list to a sheriff deputy to deliver to the trial court. One copy was for the trial court, which was filed on November 11, 2009. The second copy was for the prosecutor; defendant requested the clerk to serve that copy on the prosecutor's office. The witness list included Dr. Brian Hartfelder, an emergency room doctor who treated defendant for hip and joint pain on June 22, 2009. The prosecutor's office never received its copy of the witness list. The prosecutor discovered the witness list when he examined the court file in the days before trial.

In March 2010, defendant gave standby counsel a witness list with names of persons that defendant wanted subpoenaed for trial. According to standby counsel, the purpose of the testimony of the persons named on the list would be to establish a diminished capacity defense. Because the Supreme Court had abolished the diminished capacity defense, *People v Carpenter*, 464 Mich 223; 627 NW2d 276 (2001), standby counsel stated that he, as an officer of the court, could not subpoena persons who would not be allowed to testify. One of the persons that defendant requested standby counsel to subpoena was Dr. Wael Haider, who treated defendant from July 3-6, 2009, for an infected toe and nausea and vomiting.

During the first day of trial, with regard to defendant's witnesses, the trial court stated that "the rules haven't been followed" and it would "prevent bringing in witnesses that aren't properly in accordance with the rules." It also stated that, "in any event," based on standby counsel's explanation of why defendant had recently sought medical treatment it would deny any request by defendant to present any medical evidence.

Defendant claims he sought to present a "medical and mental" defense. It would have been based on him being an alcoholic and diabetic and the mixture of pain medication and alcohol. However, in his brief on appeal, defendant does not name the witnesses he would have called to establish this defense. Much less does defendant include summaries, or even affidavits, detailing the witnesses' expected testimony. Thus, we cannot determine whether the defense that defendant wanted to place before the jury was a permissible defense or was, as asserted by standby counsel, a diminished capacity defense, which is no longer recognized in this state. Accordingly, defendant fails to establish that, even if standby counsel had subpoenaed the witnesses that he had requested or even if defendant employed a proper method in serving his

first witness list, he would have been allowed to present his "mental and medical" defense. Accordingly, we find no merit to defendant's arguments concerning the witness lists.

Defendant next contends that Detective Freddy Johnson presented false testimony at trial concerning the custody and authenticity of the bank surveillance video and his interview notes, that the prosecutor knowingly allowed, and even vouched for, the false testimony, and that the trial court was complicit in accepting the false testimony. We have reviewed Detective Johnson's testimony and the relevant portions of the transcripts of the pretrial hearings, and find no merit to defendant's arguments. Although it was never stated during pretrial hearings that Johnson took custody of the surveillance video after he interviewed Earle,[5] nothing suggests that Johnson lied when he testified at trial that he seized the video the day of the bank robbery and since then it has been in police custody. Similarly, nothing suggests that Johnson lied at trial when he testified that he did not destroy his notes from his interview with Earle. Johnson testified that he never provided his notes to the prosecutor, and the prosecutor informed the court that he had been advised the notes had been destroyed.

Defendant argues that the carjacking statute, MCL 750.529a, is void for vagueness because the statute does not set forth the elements of the crime of "attempted carjacking." He also claims that he should have been charged with resisting or obstructing Officer Johnson, MCL 750.81d, rather than carjacking, and that MCL 750.81d has been declared unconstitutional by federal courts.

The prosecution initially charged defendant with attempted carjacking, but the complaint was amended at the preliminary examination to carjacking when the prosecutor informed the trial court that the statutory definition of carjacking includes attempted carjacking. A statute is presumed constitutional, *People v Malone*, 287 Mich App 648, 658; 792 NW2d 7 (2010), and the party challenging the statute has the burden to prove its invalidity, *People v Thomas*, 201 Mich App 111, 117; 505 NW2d 873 (1993). A criminal statute is unconstitutionally vague if "it does not provide fair notice of the conduct proscribed" or "it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed." *People v Vronko*, 228 Mich App 649, 652; 579 NW2d 138 (1998).[6] The proper inquiry is whether "the statute is vague as applied to the conduct allegedly proscribed in this case." *Id.* Defendant makes no argument that the language of the carjacking statute, MCL 750.529a, fails to provide a person of ordinary intelligence a reasonable opportunity to know that his conduct—entering a vehicle and using force against the driver in order to place his hands on the steering wheel and take control of the vehicle—was proscribed. *People v Hrlic*, 277 Mich App 260, 263; 744 NW2d 221 (2007). Accordingly, we reject defendant's argument that the carjacking statute is unconstitutionally vague.

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[5] The discussions generally concerned the fact that the surveillance video was only viewable on equipment owned by the bank.

[6] A statute may also be unconstitutionally vague if it impinges on First Amendment freedoms. *Vronko*, 228 Mich App at 652. Defendant makes no argument that the carjacking statute impinges on those freedoms.

A prosecutor has broad charging discretion. *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). He may charge any offense supported by the evidence. *Id.* As defendant's conviction for carjacking is supported by sufficient evidence, see part II, *supra*, the evidence supported a charge under MCL 750.529a. Defendant's argument that he should have been charged with resisting or obstructing Officer Jackson rather than carjacking is without merit.

Defendant asserts that he has been denied his constitutional rights where transcripts of the preliminary examination conference, the preliminary examination, motion hearings, and trial have been falsified. In order to overcome the presumption of accuracy afforded certified transcripts, a defendant must satisfy four requirements: the defendant must "(1) seasonably seek relief; (2) assert with specificity the alleged inaccuracy; (3) provide some independent corroboration of the asserted inaccuracy; [and] (4) describe how the claimed inaccuracy in transcription has adversely affected the ability to secure postconviction relief . . . ." *People v Abdella*, 200 Mich App 473, 476; 505 NW2d 18 (1993). Here, defendant has provided no independent corroboration of the alleged inaccuracies, nor has he explained how the alleged inaccuracies have adversely affected his ability to appeal his convictions. Accordingly, we find no merit to defendant's argument.

Defendant next claims that his convictions must be reversed because there was a violation of the 180-day rule, MCL 780.131. He also argues that the district court and trial court erred in refusing to order the Michigan Department of Corrections (MDOC) to send written notice of his imprisonment to the county's prosecuting attorney.

MCL 780.131(1) provides:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against *any inmate of a correctional facility of this state* a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the placement of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. . . . [Emphasis added.]

The 180-day rule "applies only to those defendants who, at the time of trial, are currently serving in one of our state [correctional facilities], and not to individuals awaiting trial in a county jail." *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003). Defendant concedes that he was awaiting trial in a county jail, but claims that because he was on parole, thereby being under the custody and control of the MDOC, see MCL 791.238(1), the 180-day rule still applied to him. However, this Court has held that the 180-day rule does not apply to a parolee awaiting trial in jail. *People v Sanders*, 130 Mich App 246, 251; 343 NW2d 513 (1983); see also *People v Von Everett*, 156 Mich App 615, 619; 402 NW2d 773 (1986). Accordingly, the 180-day rule does not apply to defendant. But even if the 180-day rule applied to defendant, and defendant's assertion that the 180-day period started on July 13, 2009, is accurate, defendant would not be entitled to any relief. The prosecutor undertook action to bring defendant to trial

within 180 days and those preliminary actions were not followed by inexcusable delay. *People v Lown*, 488 Mich 242, 246-247, 260; 794 NW2d 9 (2011).

Finally, defendant requests us to review the trial court's rulings on various motions filed by him below. Defendant, by merely listing the motions, has abandoned the issue. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999); see also *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens